

Law Office of Jack Silver

P.O. Box 5469

Santa Rosa, California 95402

Phone 707-528-8175

Fax 707-528-8675

lhm28843@sbcglobal.net



Via Certified Mailing - Return Receipt

January 2, 2013

Erik Mattson - Registered Agent/General Manager
William C. Elliott - Owner
Bay Marine Boatworks, Inc.
310 West Cutting Blvd.
Richmond, CA 94804

Miguel Feijoo - Registered Agent
Mike DeSimoni, Jr. - President
Channel Lumber Company
100 West Cutting Blvd.
Richmond, CA 94804

**Re: Notice of Violations and Intent to File Suit Under the Federal Water
Pollution Control Act ("Clean Water Act")**

Dear Owners, Operators and/or Facility Managers:

NOTICE

This Notice is provided on behalf of Northern California River Watch ("River Watch") in regard to violations of the Clean Water Act ("CWA" or "Act") 33 U.S.C. § 1251 *et seq.*, that River Watch believes are occurring at the Bay Marine Boatworks, Inc. marine repair and maintenance facility located at 310 W. Cutting Boulevard in Richmond. Notice is being sent to you as the responsible owner, officer, operator or manager of this property and facility. This Notice addresses the violations of the CWA, including violation of the terms of the General California Industrial Storm Water Permit and unlawful discharge of pollutants from the Bay Marine Boatworks, Inc. facility into the Santa Fe Channel and Richmond Harbor.

CWA § 505(b) requires a citizen to give notice of intent to file suit sixty (60) days prior to the initiation of a civil action under Section 505(a) of the Act. Notice must be given to the alleged violator, the U.S. Environmental Protection Agency ("EPA"), and the state in

which the violations occur. As required by the CWA, this Notice provides notice of the violations that have occurred, and continue to occur at the Bay Marine Boatworks, Inc. facility. Consequently, Bay Marine Boatworks, Inc. and Channel Lumber Company (the "Discharger") is placed on formal notice by River Watch that after the expiration of sixty (60) days from the date of this Notice, River Watch will be entitled to bring suit in the United States District Court against the Discharger for continuing violations of an effluent standard or limitation, permit condition or requirement, or Federal or State Order or Plan issued under the CWA in particular, but not limited to, CWA § 505(a)(1), the Code of Federal Regulations, and the Regional Water Quality Control Board's Water Quality Control Plan or "Basin Plan," as exemplified by the incidents of non-compliance identified and outlined in this Notice.

The CWA requires that any Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto shall include sufficient information to permit the recipient to identify the following:

1. *The specific standard, limitation, or order alleged to have been violated.*

To comply with this requirement, River Watch notices the Discharger of the ongoing violations of the substantive and procedural requirements of CWA § 402(p) and violations of the National Pollutant Discharge Elimination System ("NPDES") Permit No. CA S000001, State Water Resources Control Board, Order No. 92-12-DWQ as amended by Order No. 97-03-DWQ ("General Permit"), relating to marine facility services for the maintenance and repair of vessels.

Bay Marine Boatworks, Inc. filed an Notice of Intent ("NOI") agreeing to comply with the terms and conditions of the General Permit. The NOI was approved by the State Water Resources Control Board on or about October 5, 2005 and Bay Marine Boatworks, Inc. was assigned Waste Discharger Identification ("WDID") number 2_07I001646. River Watch contends that in the operations of the Bay Marine Boatworks, Inc. facility, the Discharger has failed and is failing to comply with the terms and conditions of the General Permit requiring not just the preparation, but the implementation, review and update of its Storm Water Pollution Prevention Plan ("SWPPP"), the elimination of all non-authorized storm water discharges, and the development and implementation of an adequate monitoring and reporting program.

The 2007-2008, 2008-2009 (as to the first sample), 2009-2010, and 2010-2011 Annual Reports submitted by Bay Marine Boatworks, Inc. to the State Water Resources Control Board and Regional Water Quality Control Board demonstrate that Bay Marine Boatworks, Inc. failed to adequately sample for pollutants that have a reasonable potential of being present in discharges from the Bay Marine Boatworks, Inc. facility, including pollutants listed both in the California Toxics Rule ("CTR," 40 C.F.R. part 131) applicable specifically to regulated facilities identified by SIC Code 3732 such as copper, as well as EPA

Benchmarks. Compliance with the CTR and EPA Benchmarks illustrate whether Bay Marine Boatworks, Inc. implemented Best Management Practices ("BMPs") by the use of the Best Available Technology Economically Achievable ("BAT") and Best Conventional Pollutant Control Technology ("BCT").

The single reported sampling and analysis in 2007-2008, both reporting samplings and analyses in 2008-2009, and the single reported sampling and analysis in the 2011-2012 Annual Reports reveal that Bay Marine Boatworks, Inc. has discharged and continues to discharge storm water with unacceptable levels of zinc from the facility in violation of the General Permit. The single reported samplings and analysis in the 2008-2009 and 2011-2012 Annual Reports reveal that Bay Marine Boatworks, Inc. has discharged and continues to discharge storm water with unacceptable levels of copper from the facility in violation of the General Permit. Self-monitoring reports under the Permit are deemed "conclusive evidence of an exceedance or a permit limitation." *Sierra Club v. Union Oil*, 813 F.2d 1480, 1493 (9th Cir. 1988).

In addition to failing to fully sample for required pollutants and exceeding the pollutant level in discharges of copper and zinc as described above, Bay Marine Boatworks, Inc. failed to obtain and report any water quality samples in reporting years 2009-2010 and 2010-2011, and sampled only one storm event in 2007-2008 and 2011-2012. Bay Marine Boatworks, Inc.'s repeated statement in the Annual Reports that it did not, because of the absence of rain or the timing of rain events, have the opportunity to collect the mandated two samples during all of the past five years is contradicted by the evidence of reported sampling by other facilities in close proximity to Bay Marine Boatworks, Inc. that are also covered under the General Permit and reported to the State and Regional Boards.¹

2. *The activity alleged to constitute a violation.*

River Watch sets forth narratives within this Notice describing discharges of pollutants from marine facility services and operations at Bay Marine Boatworks, Inc. to waters of the United States in violation of the General Permit and CWA § 301(a). These narratives describe with particularity specific incidents which may not have been reported in public reports and other public documents in the Discharger's possession or otherwise available to the Discharger. River Watch incorporates by reference the records cited in this Notice from which descriptions of specific incidents were obtained.

¹ Note that the report of storm events by the National Weather Service Forecast Office for "Downtown San Francisco F-6" (http://www.wrh.noaa.gov/mtr/SFD_F6/sfd_f6.php) demonstrates that Bay Marine Boatworks had sufficient opportunity to collect the full complement of 10 water quality samples at the storm water discharge location identified on the updated June, 2012 SWPPP during the period 2007-2012.

River Watch, in addition to alleging illegal storm water discharges, alleges Bay Marine Boatworks, Inc. discharges non-storm water that is not authorized under the General Permit from its facility, in violation of CWA § 301(a). These discharges, which require a separate individual NPDES permit, include the power-washing of equipment and vessels, and painting and repair activities that allow the discharge (via surface water and drift) of pollutants to waters of the United States

3. *The person or persons responsible for the alleged violation.*

The person or persons responsible for the alleged violations are Bay Marine Boatworks, Inc. and Channel Lumber Company, referred to herein as the Discharger.

4. *The location of the alleged violation.*

There are numerous point sources from which the pollutants identified in this Notice are generated, including boats, power washing equipment, as well as the discrete conduits by which these pollutants are conveyed to navigable surface waters.

The location or locations of the various violations is the permanent address of the facility at 310 W. Cutting Boulevard, Richmond, California 94804, including the adjoining waters of the tidally influenced Santa Fe Channel, Richmond Harbor, and San Francisco Bay - all waters of the United States.

5. *The date or dates of violation or a reasonable range of dates during which the alleged activity occurred.*

The range of dates covered by this Notice is from December 31, 2007 to December 31, 2012. River Watch will from time to time update this Notice to include all violations which occur after the range of dates covered by this Notice. Some of the violations are continuous in nature, therefore each day constitutes a violation.

6. *The full name, address, and telephone number of the person giving notice.*

The entity giving notice is Northern California River Watch, P.O. Box 817, Sebastopol, CA 95472, referred to throughout this Notice as "River Watch." River Watch may be contacted via email: US@ncriverwatch.org, or through its attorneys. River Watch is a non-profit corporation organized under the laws of the State of California, dedicated to the protection and enhancement of the waters of the State of California including all rivers, creeks, streams and groundwater in Northern California.

River Watch has retained legal counsel with respect to the issues set forth in this Notice. All communications should be addressed to:

Law Offices of Jack Silver
David Weinsoff, Esq.
P.O. Box 5469
Santa Rosa, CA 95402-5469
Tel. 707 528-8175
Fax. 707 528-8675
Email: lhm28843@sbcglobal.net

STATUTORY BACKGROUND

CWA § 301(a), 33 U.S.C. §1311(a), prohibits the discharge of any pollutant into waters of the United States, unless such discharge is in compliance with various enumerated sections of the Act. Among other things, Section 301(a) prohibits discharges not authorized by, or in violation of, the terms of an individual NPDES permit or a general NPDES permit issued pursuant to CWA § 402(p), 33 U.S.C. §1342.

As background, in 1987 Congress amended the Clean Water Act, adding among other provisions section 402(p). CWA § 402(p) is entitled Municipal and Industrial Stormwater Discharges. It states: "(1) General rule. Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 402 of this Act [this section]) shall not require a permit under this section for discharges composed entirely of stormwater." Pollutants found on the Discharger's site are not "incidental" to stormwater runoff and cannot be considered "entirely storm water" for purposes of CWA § 402(p). They are incidental only to the Discharger's onsite activities and would be nearly the same regardless of whether this property was in an urban or rural setting.

CWA § 402(p), 33 U.S.C. §1342(p), establishes a framework for regulating storm water discharges under the NPDES program. States with approved NPDES permitting programs are authorized under this section to regulate storm water discharges through permits issued to dischargers and/or through the issuance of a single, statewide general permit applicable to all storm water dischargers. Pursuant to CWA § 402, the Administrator of the U.S. EPA has authorized California's State Water Resources Control Board to issue NPDES permits including general NPDES permits in California.

The State Water Resources Control Board elected to issue a statewide general permit for industrial discharges, and issued the General Permit on or about November 19, 1991, modified the General Permit on or about September 17, 1992, and reissued the General Permit on or about April 17, 1997, pursuant to CWA § 402(p).

In order to discharge storm water lawfully in California, industrial dischargers must comply with the terms of the General Permit or have obtained an individual NPDES permit and complied with its terms.

The General Permit contains certain absolute prohibitions. Discharge Prohibition A(1) of the General Permit prohibits the direct or indirect discharge of materials other than storm water ("non-storm water discharges"), which are not otherwise regulated by a NPDES permit, to the waters of the United States. Discharge Prohibition A(2) prohibits storm water discharges and authorized non-storm water discharges that cause or threaten to cause pollution, contamination, or nuisance. Receiving Water Limitation C(1) of the General Permit prohibits storm water discharges to any surface or ground water that adversely impact human health or the environment. Receiving Water Limitation C(2) prohibits storm water discharges that cause or contribute to an exceedance of any applicable water quality standards contained in a Statewide Water Quality Control Plan or the applicable Regional Water Quality Control Board water quality control plan.

In addition to absolute prohibitions, the General Permit contains a variety of substantive and procedural requirements that dischargers must meet. Facilities discharging, or having the potential to discharge, storm water associated with industrial activity that have not obtained an individual NPDES permit must apply for coverage under the General Permit by filing a NOI. The General Permit requires existing dischargers to file NOIs before March 30, 1992.

Dischargers must also develop and implement a SWPPP. The SWPPP must comply with the standards of BAT and BCT. The SWPPP must, among other requirements, identify and evaluate sources of pollutants associated with industrial activities that may affect the quality of storm and non-storm water discharges from the facility and identify and implement site-specific BMPs to reduce or prevent pollutants associated with industrial activities in storm water and authorized non-storm water discharges [Section A(2)]. BMPs must implement BAT and BCT [Section B(3)]. The SWPPP must include: a description of individuals and their responsibilities for developing and implementing the SWPPP [Section A(3)]; a site map showing the facility boundaries, storm water drainage areas with flow pattern and nearby water bodies, the location of the storm water collection, conveyance and discharge system, structural control measures, impervious areas, areas of actual and potential pollutant contact, and areas of industrial activity [Section A(4)]; a list of significant materials handled and stored at the site [Section A(5)]; and a description of potential pollutant sources including industrial processes, material handling and storage areas, dust and particulate generating activities, and a description of significant spills and leaks, a list of all non-storm water discharges and their sources, and a description of locations where soil erosion may occur [Section A(6)]. The SWPPP must include an assessment of potential pollutant sources at the facility and a description of the BMPs to be implemented at the facility that will reduce or prevent pollutants in storm water discharges and authorized non-storm water discharges, including structural BMPs where non-structural BMPs are not effective [Section A(7), (8)].

The SWPPP must be periodically evaluated to ensure effectiveness and must be revised where necessary [Section A(9),(10)].

As stated above, River Watch contends that in the operation of the Bay Marin Boatworks, Inc. facility, the Discharger has failed and is failing to comply with the terms and conditions of the General Permit requiring the preparation, implementation, review and update of an adequate SWPPP, the elimination of all non-authorized storm water discharges, and the development and implementation of an adequate monitoring and reporting program.

The General Permit requires dischargers to eliminate all non-storm water discharges to storm water conveyance systems other than those specifically set forth in Special Condition D(1)(a) of the General Permit and meeting each of the conditions set forth in Special Condition D(1)(b).

As part of their monitoring program, dischargers must identify all storm water discharge locations that produce a significant storm water discharge, evaluate the effectiveness of BMPs in reducing pollutant loading, and evaluate whether pollution control measures set out in the SWPPP are adequate and properly implemented. Dischargers must conduct visual observations of these discharge locations for at least one storm per month during the wet season (October through May) and record their findings in their Annual Report. Dischargers must also collect and analyze storm water samples from at least two storms per year in compliance with the criteria set forth in Section B(5). Dischargers must also conduct dry season visual observations to identify sources of non-storm water pollution in compliance with Section B(7).

Section B(14) of the General Permit requires dischargers to submit an "Annual Report" by July 1 of each year to the executive officer of the relevant Regional Water Quality Control Board. Section A(9)(d) of the General Permit requires the discharger to include in their annual report an evaluation of their storm water controls, including certifying compliance with the General Permit. *See also* Sections C(9), C(10) and B(14).

The EPA has established Parameter Benchmark Values as guidelines for determining whether a facility discharging storm water has implemented the requisite BAT and BCT. 65 Fed. Reg. 64746, 64767 (Oct. 30, 2000). California Toxic Rule limitations are also applicable to all non storm water and storm water discharges. (40 C.F.R. part 131).

The Regional Water Quality Control Board has established water quality standards for the San Francisco basin. This Basin Plan includes a narrative toxicity standard and a narrative oil and grease standard. The Basin Plan provides that "[w]aters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses." The Basin Plan establishes limits on metals, solvents, pesticides and other hydrocarbons.

VIOLATIONS

River Watch contends that between December 31, 2007 and December 31, 2012 the Discharger violated the CWA, the Basin Plan and the Code of Federal Regulations by discharging pollutants to waters of the United States without an individual NPDES permit, or in violation of the General Permit.

The violations discussed herein are derived from eye witness reports and records publically available, or records in the possession and control of Bay Marine Boatworks, Inc. Furthermore, River Watch contends these violations are continuing.

As discussed above, the Discharger has failed and is failing to consistently complete and report to annual sampling and analysis results to the State Board. In addition, the Discharger, in the annual sampling and analysis that it has conducted, has failed and is failing to consistently sample for the full range of pollutants commonly found in discharges from boat building and repair facilities such as Bay Marine Boatworks, Inc. including, but not limited to, zinc and copper. Finally, review of the insufficient but available sampling and analysis results from the past five years reveals that the Discharger has, when it does fully sample, repeatedly violate the water quality limitation for zinc and copper established by the EPA under the California Toxics Rule (40 C.F.R. § 131.38):

<u>Date of Sample</u>	<u>Sample Result</u>	<u>CTR / Zinc</u>
01/03/08	0.95 mg/l	0.09 mg/l
10/30/08	1.7 mg/l	0.09 mg/l
02/21/09	0.16 mg/l	0.09 mg/l
04/10/12	0.29 mg/l	0.09 mg/l
<u>Date of Sample</u>	<u>Sample Result</u>	<u>CTR / Copper</u>
02/21/09	0.17 mg/l	0.0048 mg/l
04/10/12	0.61 mg/l	0.0048 mg/l

As illustrated by the sampling results above, River Watch also believes that the Bay Marine Boatworks, Inc. site is neither properly bermed nor operated to ensure that storm and non-storm water discharges are properly contained, controlled, and/or monitored. As a result, Bay Marine Boatworks, Inc. fails to follow the requirements of the General Permit in its sampling protocols by failing to consistently capture "first flush" samples and failing to sample from all the outfalls of the facility.

REMEDIAL MEASURES REQUESTED

River Watch believes that implementation of the following remedial measures are necessary in order to bring the Discharger into compliance with the CWA and reduce the biological impacts of its non-compliance upon public health and the environment surrounding both facilities:

1. Prohibition of the discharges of pollutants including, but not limited to, paint, oil and grease, fuel, solvents, solid waste, chemical waste, biological material, garbage, dirt, dust, and metals (including copper and zinc) from the vessel repair and maintenance activities.
2. Compliance with the terms and conditions of the General Permit, and BMPs detailed in the EPA's Industrial Stormwater Fact Sheet Series, Sector R: Ship and Boat Building or Repair Yards" (EPA Office of Water, EPA-833-F-06-033, December 2006; (www.epa.gov/npdes/pubs/sector_r_shipbuilding.pdf)).
3. Compliance with the storm water sampling, monitoring and reporting requirements of the General Permit.
4. Sampling of storm water at least four (4) times per year over each of the next five (5) years: at "first flush"; the first significant rain after "first flush"; the first significant rain after April 1; and the second significant rain after April 1.
5. 100% of the discharge from the Bay Marine Boatworks, Inc. site and facility must be discharged through discrete conveyances.
6. Any discharge from the Bay Marine Boatworks, Inc. site and facility to a water of the United States must be sampled during the four (4) sampling events identified in paragraph #4 above.
7. Preparation and submittal to the Regional Water Quality Control Board of a "Reasonable Potential Analysis" for the Bay Marine Boatworks, Inc. site and its operations.
8. Preparation of an updated SWPPP including a monitoring program, with a copy provided to River Watch.

CONCLUSION

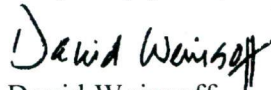
CWA §§ 505(a)(1) and 505(f) provide for citizen enforcement actions against any "person," including individuals, corporations, or partnerships, for violations of NPDES permit requirements and for unpermitted discharges of pollutants. 33 U.S.C. §§1365(a)(1)

and (f), § 1362(5). An action for injunctive relief under the CWA is authorized by 33 U.S.C. § 1365(a). Violators of the Act are also subject to an assessment of civil penalties of up to \$32,500 per day/per violation for all violations occurring through January 12, 2009, and \$37,500 per day/per violation for all violations occurring after January 12, 2009, pursuant to Sections 309(d) and 505 of the Act, 33 U.S.C. §§ 1319(d), 1365. *See also* 40 C.F.R. §§ 19.1-19.4.

The violations set forth in this Notice effect the health and enjoyment of members of River Watch who reside and recreate in the affected communities. Members of River Watch use the affected watersheds for recreation, sports, fishing, swimming, hiking, photography, nature walks and the like. Their health, use and enjoyment of this natural resource is specifically impaired by the Discharger's violations of the CWA as set forth in this Notice.

River Watch believes this Notice sufficiently states grounds for filing suit. At the close of the 60-day notice period or shortly thereafter River Watch has cause to file a citizen's suit under CWA § 505(a) against the Discharger for the violations of the CWA described in this Notice. During the 60-day notice period, River Watch is willing to discuss effective remedies for the violations identified in this Notice. However, if the Discharger wishes to pursue such discussions in the absence of litigation, it is suggested those discussions be initiated soon so that they may be completed before the end of the 60-day notice period. River Watch does not intend to delay the filing of a lawsuit if discussions are continuing when the notice period ends.

Very truly yours,


David Weinsoff

DW:lhbm

cc: Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Washington, D.C. 20460

✓ Regional Administrator
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Executive Director
State Water Resources Control Board
P.O. Box 100
Sacramento, California 95812

Executive Officer
Regional Water Quality Control Board
San Francisco Bay Region
1515 Clay Street / Suite 1400
Oakland, CA 94612

Channel Lumber Company
1001 2nd Street, Suite 295
Napa, CA 94559